The ruling you have requested has been amended as a result of litigation and has been attached to this document.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2005

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress, Ste. 1700
Austin, Texas 78701

OR2005-04100

Dear Mr. Kimbrough:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223907.

The Village of Bee Cave (the "village"), which you represent, received a request for all information regarding the August 10, 2004, meeting agenda item #14. You state that you do not have some of the requested information because it is no longer in the possession of the village.[1] You state that you will release some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.110, 552.111, and 552.131 of the Government Code. Further, you state that the request may involve third party proprietary interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified HCS Holding Company, L.P. ("HCS") of the request for information and of its right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

[1]The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. — San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

The village claims that Exhibit C is excepted from public disclosure by section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The village states that Exhibit C contains a memorandum that is a confidential communication between a village attorney and officials and employees of the village. You also state that the memorandum was made in confidence and remains confidential. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to Exhibit C. Accordingly, we

conclude that the village may withhold Exhibit C pursuant to section 552.107(1) of the Government Code.

We will now address the arguments for Exhibit D. Section 552.131 provides:

> (a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:
>
> (1) a trade secret of the business prospect; or
>
> (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.*

Although HCG raises section 552.131 for its prospective tenant information, the entity does not submit any arguments explaining the applicability of the exception. Further, the village has not demonstrated that the information in Exhibit D is excepted under section 552.131. Accordingly, we conclude that Exhibit D is not excepted pursuant to section 552.131(a) of the Government Code.

HCG also claims that the prospective tenant information in Exhibit D is confidential under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of

> customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
>
> (2) the extent to which it is known by employees and others involved in [the company's] business;
>
> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
>
> (4) the value of the information to [the company] and to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

HCG claims that the prospective tenant information in Exhibit D is confidential under section 552.110 as a trade secret. However, HCG has not demonstrated that the information it seeks to withhold meets the definition of a trade secret. We therefore determine that none of Exhibit D is excepted from disclosure under section 552.110(a) of the Government Code. HCG also states that release of the prospective tenant information would cause substantial competitive harm to HCG. However, we find that neither the village nor HCG has provided specific factual evidence substantiating the claims that the release of any information in Exhibit D would result in substantial competitive harm to HCG. Accordingly, we determine that none of Exhibit D is excepted from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

HCG also claims that the prospective tenant information in Exhibit D is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Although HCG raises section 552.101, HCG does not submit any arguments explaining why the prospective tenant information is confidential by law. Furthermore, we are not aware of any provision of law that makes the perspective tenant information confidential under section 552.101. Therefore, the village may not withhold any of the information in Exhibit D under section 552.101 of Government Code. Accordingly, Exhibit D must be released.

The village claims that the document in Exhibit E is protected under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant).

The village states that the document in Exhibit E is the handwritten notes of the mayor of the village. However, the content of the notes is purely factual. Accordingly, section 552.111 is not applicable to Exhibit E and the village may not withhold it under this provision.

The village also claims that Exhibit E is protected by section 552.106 of the Government Code, which excepts from required public disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* After reviewing Exhibit E, we find that it consists solely of factual information that does not reflect policy judgments or recommendations involved in the preparation of proposed legislation. Therefore, we find that Exhibit E is not excepted from disclosure under section 552.106 of the Government Code. Accordingly, Exhibit E must be released.

In summary, the village may withhold Exhibit C under section 552.107(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

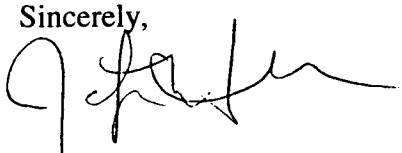
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 223907

Enc. Submitted documents

c: Ms. Sarah Baker
Save Our Springs Alliance
P. O. Box 684881
Austin, Texas 78768
(w/o enclosures)

Mr. J. Bruce Scrafford
Armbrust & Brown, L.L.P.
100 Congress Avenue, Ste. 1300
Austin, Texas 78701-2744
(w/o enclosures)

CAUSE NO. GN501798

| | | |
|---|---|---|
| HCG MASTER GROUND LEASE, L.P., Plaintiff, | § | IN THE DISTRICT COURT OF |
| | § | |
| V. | § | |
| | § | TRAVIS COUNTY, TEXAS |
| VILLAGE OF BEE CAVE, TEXAS and the ATTORNEY GENERAL FOR THE STATE OF TEXAS, | § | |
| | § | |
| Defendants. | § | 201ST JUDICIAL DISTRICT |

05 SEP 14 PM 1:56

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff HCG Master Ground Lease, L.P. (HCG), and Defendants Village of Bee Cave, Texas and Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Sarah Baker, was sent reasonable notice of this setting and of the parties' agreement that the Village must withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, the names of HCG's prospective tenants at the Hill Country Galleria, is commercial information and excepted from disclosure by Tex. Gov't Code § 552.110(b);

2. The Village must withhold from the requestor the information described in Paragraph 1 of this Judgment unless HCG gives written consent to its disclosure. In any event, once the name of a prospective tenant is made public, the name is subject to disclosure under the PIA and this Judgment and the parties' Settlement Agreement may not be used to withhold such name if another request for information is made to the Village;

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 14th day of Sept., 2005.

PRESIDING JUDGE

APPROVED:

J. BRUCE SCRAFFORD
Armbrust & Brown, L.L.P.
100 Congress Avenue, Suite 1300
Austin, Texas 78701
Telephone: 435-2300
Fax: 435-2360
State Bar No. 17931100
ATTORNEY FOR PLAINTIFF

BRENDA LOUDERMILK
Chief, Open Records Litigation
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 475-4292
Fax: 320-0167
State Bar No. 12585600
ATTORNEY FOR DEFENDANT GREG ABBOTT, ATTORNEY GENERAL OF TEXAS

CHARLES KIMBROUGH
Bickerstaff, Heath, Smiley, Pollan Kever & McDaniel
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
Telephone: 472-8021
Fax: 320-5638
State Bar No. 11424700
ATTORNEY FOR DEFENDANT VILLAGE OF BEE CAVE, TEXAS